United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7160

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

MUSIC RESEARCH INC., and ADELPHI RECORDS, INC.,

Plaintiffs-Appellees-Appellants,

vs.

VANGUARD RECORDING SOCIETY, INC.,

Defendant and Third-Party Plaintiff-Appellant-Appellee,

vs.

HERB GART d/b/a HERB GART MANAGEMENT,

Third-Party Defendant.

BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT-APPELLEE

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MUSIC RESEARCH, INC., and ADELPHI RECORDS, INC.,

Plaintiffs-Appellees-Appellants,

-against-

VANGUARD RECORDING SOCIETY, INC.,

Defendant & Third Party Plaintiff-Appellant-Appellee,

-against-

HERB GART, d/b/a HERB GART MANAGEMENT, INC.,

Third Party Defendant.

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BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF - APPELLANT - APPELLEE

Preliminary Statement

Defendant, Vanguard Recording Society, Inc. ("Vanguard") appeals from a judgment (572-73a)* entered in the Southern District of New York after a jury verdict

* All numbers in parentheses ending in "a" refer to pages in the Joint Appendix. Exhibits reproduced in the Joint Appendix are identified by exhibit number and the page at which they appear in the Joint Appendix. Trial exhibits not reproduced are designated "Trial Exhibit" and appropriately numbered. The abbreviation "P. Br." refers to the main brief of plaintiffs - appellees - appellants.

awarding $275,000 to plaintiff Music Research, Inc. ("Music Research"). Vanguard also appeals from the denial (678a) of its motion, pursuant to Rule 60, for a new trial on the grounds of (a) newly discovered evidence which would have affected the outcome of the trial, and (b) plaintiffs' fraud in procuring the judgment.

Music Research and plaintiff Adelphi Records, Inc. ("Adelphi") cross appeal from the dismissal of their claims sounding in unfair competition, unjust enrichment and tortious interference with contracts.

Issues Presented

1. Whether Music Research's claimed damages resulted from reliance on misrepresentations or resulted solely from Vanguard's exercise of contractual rights.

2. Whether Music Research may recover in the absence of competent proof that it parted with anything in reliance on alleged misrepresentations.

3. Whether knowledge imputed to Music Research, a corporation, as a matter of substantive law defeats any claims based on alleged false statements concerning corporate acts.

4. Whether, in the light of all the circumstances, Music Research could reasonably rely on the claimed misrepresentations.

5. Whether Music Research adduced competent proof of any damages attributable to Vanguard's alleged misrepresentations.

6. Whether the damages awarded by the jury were so excessive that it would be a denial of justice to permit the verdict to stand.

7. Whether the Court below erred in (a) holding immaterial the invalidity and cancellation of the contract from which Music Research derived the rights which Vanguard allegedly invaded, and (b) excluding evidence pertaining to this issue; thus, in effect, holding immaterial the question whether Music Research owned the rights allegedly invaded.

8. Whether Music Research's fraud claim was barred by the Statute of Limitations.

9. Whether the Court below abused its discretion in denying Vanguard's motion for a new trial under Rule 60 in the light of (a) newly discovered material evidence which would have affected the outcome of the trial; and (b) undisputable proof that the judgment was obtained by means of material perjury and other misconduct on plaintiffs' part.

10. Whether, at the very least, the Court below should have granted an evidentiary hearing if there was any conceivable doubt about any facts relied on by Vanguard on the Rule 60 motion.

11. The cross appeal presents the issue whether the Trial Court erred in (a) taking from the jury the question whether Music Research's agent had apparent authority to bind Music Research to a contract with Vanguard; (b) resolving that issue in the affirmative; and (c) dismissing on that ground all claims except the one based on fraud.

12. Whether, assuming that there was no valid contract, damages caused by Vanguard's tortious invasion of property rights can be attributed to reliance on misrepresentations.

Statement of the Case

Prior Proceedings

Music Research and Adelphi commenced this diversity action against Vanguard on January 26, 1973. They asserted four claims for relief sounding, respectively, in unfair competition, unjust enrichment, tortious interference with contracts, and common law fraud. A third-party claim by Vanguard was dismissed on consent.

The claims of Music Research were all based on rights alleged to flow from a 1963 agreement with one John Hurt, a guitarist and folk singer. Music Research claimed exclusive rights to manufacture and market records embodying Hurt's performances.

Adelphi's claims derive from a contract which it made with Music Research in 1970 licensing Adelphi to market Hurt records to be manufactured by Adelphi from Music Research's tapes of Hurt's performances.

Plaintiffs claim that Vanguard has marketed four Hurt record albums without authority. They contend that Vanguard's sale of the first two albums did not injure them but, in fact, bettered their business prospects by increasing the market for Hurt's recordings. However, plaintiffs allege that the release of Vanguard's third and fourth albums, in 1971 and 1972 respectively, damaged them by saturating the market for Hurt records, thereby making it impossible for plaintiffs to market recordings taken from the Hurt tapes licensed to Adelphi.

Vanguard's defenses included the following: (a) it had a contract with Music Research which authorized its sale of the Hurt albums; (b) plaintiffs had no rights because Music Research's contract with Hurt, from which all their rights derived, was unconscionable and had been repudiated by Hurt; (c) a denial of any fraudulent representations; (d) plaintiffs parted with nothing of value in reliance on fraudulent representations; and (e) the fraud claim was barred by the Statute of Limitations.

Vanguard moved for a directed verdict at the end

of plaintiffs' case. The Trial Court dismissed all of plaintiffs' claims, except the claim of Music Research based on fraud. The dismissal of the other claims was based on the Trial Court's finding that Music Research had, by contract, authorized Vanguard's sale of the four Hurt albums.

However, the Trial Court ruled immaterial the defense founded on the unconscionability and cancellation of Music Research's contract with Hurt and left for the jury's determination the fraud claim on the ground that it was "sufficiently colorable" (408a). The jury returned a verdict of $275,000 in favor of Music Research.

Vanguard moved to set aside the verdict as excessive, for judgment n.o.v. or a new trial under F.R.Civ.P. Rule 59, and for a new trial under Rule 60(b)(2), and (3). The motions were denied (482-83a, 677a, 679a).

The Facts

In 1963, John Hurt was a 71-year old black man who supported himself and his family by sharecropping in a remote rural community in Mississippi for a "shack" to live in and $26 a month (49a). More than thirty years

earlier, Hurt had performed occasionally as a guitarist and folk singer under the name "Mississippi John Hurt," and had made several phonograph records (47a, 52-3a).

Thomas Hoskins, who held odd jobs and had no experience whatever managing performing artists (152a), persuaded Hurt to attempt a comeback as a performer (53a). Hoskins brought Hurt to the office of Hoskins' lawyer (56a), where Hurt signed a contract, dated March 15, 1963, with Music Research (Exh. 1, 586-88a). Music Research had just been organized for that purpose (46a, 152a).

The contract recited that Music Research, in its brief corporate life of about two weeks, had acquired "the knowledge and skill to effectively promote the professional welfare" of Hurt, and that Hurt acknowledged "full faith in the ability of [Music Research] to effectively promote his career." Music Research undertook to "manage" and give "guidance" to Hurt's career, but expressly disclaimed any obligation to procure employment for him. Music Research undertook no other affirmative obligation whatever and even reserved the right to assign its obligations to anyone it chose.

The contract bound Hurt for five years but assured him no minimum compensation. However, if Hurt grossed as

little as $500 during the entire five-year period, Music Research could extend the contract for an additional five years. Thus, to all intents and purposes, Hurt was bound for ten years.

By the contract, Hurt conveyed to Music Research, without compensation, ownership of all songs which he had written in the past or would write during the term of the contract. Hurt also conveyed the exclusive right to his recording services, for which he would receive compensation, in the form of royalties, only if records were sold. Hurt obligated himself to pay to Music Research fifty percent of his gross compensation as a performer, and to pay out of his remaining share all expenses incurred by Music Research on his behalf.

By 1965 Hurt was dissatisfied. He had traveled all over the country and Canada performing at nightclubs, coffee houses, and song festivals (57-8a, 81a). His earnings were meager* (82-6a), and he was weary. Hurt expressed the desire, at 73-years of age, to stop traveling and to spend his last years "fishing and hunting" (87-8a, 203a).

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* According to Hoskins, records concerning Music Research's financial dealings with Hurt had been destroyed in an accident (66-7a). Hurt had complained that he had been kept "completely in the dark" about his earnings (Exh. 27, 496-97a).

Music Research had accumulated about twenty-five hours of Hurt's tape-recorded performances for possible use in the future manufacture of records ("vault tapes") (70a). Two record albums which had been released by Music Research of Hurt's performances on its "Piedmont" record label sold poorly (63-5a).

Hoskins turned to one Herb Gart who, unlike Hoskins, was an experienced theatrical manager and had negotiated contracts with established record companies (201-02a, 380a). Gart suggested that Music Research try to obtain for Hurt a recording agreement with a larger record company (86a). It was reasoned that a larger record company would pay Hurt a cash advance and help him gain greater national exposure (87-8a, 202-03a).

Hoskins wanted a "two album deal," but Gart pointed out that an established record company might not be interested in a contract limited to just two records and that a two-record contract would be difficult to obtain (203-04a).

Hoskins asked Gart to try to secure a recording contract for Hurt (201a). Hoskins testified that Gart stood to gain nothing directly from his efforts and acted largely out of concern for Hurt's welfare (204-05a, 233a).

Gart contacted Mercury Records, a major record

company with whom he had prior dealings (86a), but was able to negotiate only a four-record contract (209a). Hoskins was willing to accept a four-record contract with Mercury (Exh. G-1, 565-68a), but the negotiations were abandoned for other reasons.

After the Mercury negotiations aborted, at Hoskins' request (214a), Gart approached defendant Vanguard, with whom he had negotiated contracts for other artists in the past (163a).

He reported back that Maynard Solomon, an officer of Vanguard, expressed interest and was willing to discuss terms (214a). A meeting was arranged at Vanguard's offices, attended by Hoskins, Gart, Hurt, and Solomon (89a, 214-15a). Hoskins testified (90a) that at that meeting:

> "... it was explained to Mr. Solomon that we wanted a deal for two and only two records and we wanted a sizeable advance and that the contract would have to be signed between Vanguard and Music Research, Inc. but that Herb Gart would be handling the negotiations between the two parties...."

After that first meeting, Hoskins turned all negotiations over to Gart (159a) and never again spoke with Vanguard about terms (157a, 159a). Only Gart negotiated with Vanguard on behalf of Music Research (160-62a).

Vanguard forwarded a draft contract to Gart, who

reviewed it with Hoskins (92a). Gart took notes and undertook to propose the changes to Solomon (216-17a). He did so (217a), and shortly thereafter Gart and Hurt, at Vanguard's offices, signed the contract (388a), which contained many handwritten modifications (Exh. 57, 505-08a). It provided for a minimum of two long-playing albums of Hurt's music and additional recordings at Vanguard's election.

Gart kept the contract which he and Hurt had signed in order to obtain Hoskins' signature (388a). When Hoskins was unavailable for a period of weeks, Gart returned the contract to Vanguard "for Vanguard to collect [Hoskins'] signature whenever it was that he showed up because the matter had to move forward for John [Hurt] to get his money and start making records" (388-89a).

Vanguard issued its check for the cash advance called for by the contract and either Hoskins or Gart gave it to Hurt. In any event, Hoskins knew about the payment at the time (219-20a). The first recording session called for by the contract took place at Vanguard's studios in February, 1966. Both Hoskins and Gart attended (95-6a, 183, 217-18a).

About that time Hurt began traveling in the company of another manager, one Dick Waterman (100-01a). According to plaintiff's counsel, Waterman "simply wanted to take John Hurt over for himself" (143a).

On April 20, 1966, Waterman wrote to Maynard Solomon

(Exh. 27, 496-97a), pointing out how inequitable and onerous Hurt's agreement with Music Research was. The letter went on to say that Hurt was unhappy because Music Research had not paid what was due him and because Music Research had completely neglected him. Waterman's letter asked Solomon to help Hurt void the contract.

Hurt also spoke to Solomon directly and asked him for help because he considered his contract with Music Research onerous and wanted to break it (354a). Solomon said that he did not want to become involved in the dispute, but did refer Hurt to Vanguard's attorney (355a).

Hurt instructed Vanguard's attorney, in writing, to terminate his agreement with Music Research (Exh. 29, 499a). On June 10, 1966, the attorney wrote to Hoskins, by registered mail, that Hurt was terminating his agreement with Music Research because it had been breached by Music Research and because it was unconscionable. He demanded that Music Research return immediately all its tapes of Hurt's performances (the "vault tapes" which underlie all of plaintiff's damage claims). The letter also advised Hoskins that Vanguard "is the only party having the exclusive rights to release phonograph records... embodying the performances of Mr. Hurt" (Exh. G-2, 569-71a).

A short while later, Vanguard released its first Hurt album for public sale (103-04a). In November of 1966, Hurt died (82a). Vanguard released a second Hurt album in September of 1967 (105a).

Approximately three years later, in June, 1970, Music Research entered into an agreement with the co-plaintiff, Adelphi, by which it licensed Adelphi to manufacture and sell record albums of Hurt's performances taken from Music Research's vault tapes (106a, Exh. 11, 489-90a). Under the agreement, Adelphi paid a $700 advance against guaranteed minimum royalties of $2,500 on the later sale of Hurt albums.

After entering into the license agreement, Music Research and Adelphi took some preliminary steps looking toward the eventual manufacture by Adelphi of a double album of Hurt's music (108a).

In April, 1971, Vanguard released a third Hurt album and in February, 1972, a fourth (108-10a). Because of the release of these albums, according to plaintiffs' trial testimony, the market for Hurt recordings had become so saturated that plaintiffs abandoned the planned manufacture and sale of Hurt recordings (111-12a, 249-51a).*

Plaintiffs' claims for unfair competition, unjust enrichment, and tortious interference with contracts were all based on the contention that Gart was not vested with apparent authority to bind Music Research to its contract with Vanguard. The Trial Court found that Gart had such authority and dismissed these causes of action (405-08a). The facts on which this

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* Actually, while plaintiffs testified to this effect, they were actively manufacturing and selling a new Hurt album. The discovery of this fact after the trial was the basis of Vanguard's Rule 60 motion discussed in Point VI, infra.

finding was based are supplied in Point VII, infra.

The fraud count, which the Trial Court found "sufficiently colorable" (408a) to go to the jury, was based on Hoskins' testimony concerning three incidents, all of which took place some months after Music Research contracted with Vanguard, authorizing the latter to release the Hurt recordings.

In early February 1966, according to Hoskins, he asked Solomon whether "he had" the Vanguard recording contract with Hurt. Solomon said that he didn't, but "would send them [sic]" to Hoskins (95-6a).

In April of 1966, Solomon indicated surprise that "the contracts hadn't been sent out" and stated that he would see to it that they would be "sent" (99-100a).

Concerning the third incident, which took place in July 1966 (101a), Hoskins testified as follows (102a):

> "I asked him [Solomon] if he had signed John Hurt] to a contract or if any other papers had been signed. He said, no.
>
> I asked him also if he then had the contracts for the agreement between Vanguard and Music Research and he said that he should have them and would have them for me before I left town or he would send them to me."

There can be no question that the denial, attributed to Solomon, that Vanguard had signed Hurt to a contract, was false. It is equally fair to imply from the statements attributed to Solomon, that he falsely denied that a contract had been made between Vanguard and Music Research.

A contract, held binding by the Trial Court, had been made by Vanguard and Music Research, through Gart, at the end of 1965 and Hurt had signed it (Exh. 57, 505-08a). However, there was no evidence of any conceivable motive for Vanguard to make such patently false statements. In fact, it is undisputed that on June 10, 1966, a month before the last false statement is supposed to have been made, Vanguard deemed it in its best interests to give written notice to Hoskins and Music Research that:

> "...Mr. Hurt has entered into an exclusive recording agreement with Vanguard Recording Society, Inc. and that said company is the only party having the exclusive rights to release phonograph records...embodying the performances of Mr. Hurt." (Exh. G-2, 569a)

Summary of Argument

Before submitting the case to the jury, the Trial Court ruled that there was a valid contract by which Music Research authorized Vanguard to market the third and fourth Hurt albums; hence, there could be nothing illicit about the release of those albums. On the contrary, by granting Vanguard the right to market those

albums, Music Research became subject to a correlative duty not to interfere.

Vanguard's misrepresentations, at most, induced Music Research to perform its legal duty under the contract. No recovery may be had by one who is induced, even by fraudulent means, to perform his legal duty and no more. Damages which Music Research may have suffered resulted solely from the exercise of Vanguard's contractual rights and were, therefore, not actionable (Point I).

The nub of Vanguard's claimed misrepresentations was the denial that there was a contract by which Music Research authorized Vanguard to market Hurt albums. If plaintiffs are correct in their contention that the Music Research - Vanguard contract should not have been ruled valid, then Vanguard, perhaps unwittingly, made no material misrepresentation when it denied that such a contract existed. Vanguard's release of the offending Hurt albums may have violated whatever rights plaintiffs possessed, but any damages which Music Research may have suffered were not caused by reliance on fraudulent statements (Point VIII).

In any case, Music Research, as a corporate entity, could not have been deceived by false representations that there was no contract, because its apparent

agent executed the contract on its behalf. Such knowledge of an apparent agent is imputed to his corporate principal by operation of law (Point IV).

The Trial Court permitted evidence that Hoskins, the president of Music Research, was ignorant of its corporate act in making a contract with Vanguard, and that he relied on defendant's false statements that none had been made. Assuming that Hoskins' state of mind is material, the record shows affirmatively that the claimed reliance was unreasonable as a matter of law (Point IV).

In any event, Music Research's fraud claim was barred by the Statute of Limitations because the fraud was committed more than six years before this action was commenced; and it could have been discovered with due diligence more than two years before the commencement of the action. Indeed, it is undisputed that Vanguard gave Music Research written notice of the full truth more than six years before suit was instituted (Point V).

Further, the verdict must be vacated because the Trial Court held immaterial the invalidity and cancellation of the original contract between Music Research and John Hurt, from which Music Research derived all the rights which Vanguard is supposed to have violated. By so holding and excluding proof pertaining to that issue,

the Court below erroneously permitted Music Research to recover for damage to property rights which it may not have owned (Point III).

Assuming that there was actionable fraud, there was no competent proof of damages attributable to the fraud. Music Research parted with nothing of value in reliance on Vanguard's misrepresentations (Points I and VIII). Such damage proof as there was dealt with the damages of Adelphi, whose claims were dismissed, and not with damages suffered by Music Research. The record does show that Music Research's damages, if any, amounted, at most, to a small fraction of the sum awarded by the jury (Point II).

Finally, the verdict should have been set aside on Vanguard's Rule 60 motion. The crux of plaintiffs' grievance was that plaintiffs were prevented from releasing new Hurt albums because Vanguard had destroyed the market for Hurt music. Shortly after the trial, Vanguard discovered that a few months before the trial, plaintiffs began marketing a new Hurt album and were doing so even while the trial was in progress. Obviously, this evidence would have affected the outcome of the trial, but it could not have been discovered in time by the use of due diligence. At the trial, plaintiffs'

witnesses committed perjury and answered questions evasively to conceal this evidence. They continued their efforts to conceal even after the trial.

Plainly, Vanguard was entitled to relief under Rule 60(b)(2) and (3) on the basis of the undisputed facts. At the very least, Vanguard was entitled to the evidentiary hearing which it requested (Point VI).

POINT I

MUSIC RESEARCH'S "DAMAGES" RESULTED FROM VANGUARD'S EXERCISE OF CONTRACTUAL RIGHTS AND WERE NOT THE RESULT OF RELIANCE ON MISREPRESENTATIONS

The Trial Court instructed the jury as follows concerning Vanguard's alleged fraudulent representations (460a):

> "Those representations, it is claimed, were that Vanguard would record and publish two and only two long playing albums of Mississippi John Hurt's music, that Music Research would retain all its existing rights other than for the publication of these two albums with respect to the performances of John Hurt and that the value of Music Research's rights would be enhanced by the Vanguard recordings and that Music Research, through Mr. Hoskins, would be a signing party by the signature of Mr. Hoskins to this agreement of November 30, 1965."

The representations attributed to Vanguard in the charge are wholly unsupported by the record. The record shows only that Solomon said to Hoskins on several occasions that Hurt had not signed a contract with Vanguard and that a contract between Vanguard and Music Research for Hurt's services would be submitted to Hoskins (96a, 99-100a, 101-102a, 180a). The distortion of the record in the charge to the jury, by itself, is such fundamental error as to require reversal, even though there was no objection.

In any event, neither the false statements of which there was proof, nor those erroneously described in the charge, were capable of causing Music Research any damage.

It is elementary that reliance is to fraud what proximate cause is to negligence; fraud and injury must bear the relation of cause and effect. Brackett v. Griswold,112 N.Y. 454 (1889); Restatement, Torts, §546. Recovery can be had only for the pecuniary loss suffered as a result of reliance on defendant's false statements. Smith v. Bolles, 132 U.S. 125 (1889); Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403 (1958).

The Court permitted the jury to consider two damage claims (469-70a).

The first claim dealt with "expenses incurred" by Music Research in planning a Hurt album that was abandoned when Vanguard released its third and fourth albums. However, the record contains no proof whatever that Music Research incurred any expenses in connection with that album. There was testimony that Adelphi did, although the amount seems to have been insignificant (246-47a). But Adelphi's claims were dismissed in their entirety, and the Court correctly charged the jury that Adelphi's damages were not to be considered (470a).*

The second damage claim, the gravamen of plaintiffs' case, dealt with the damage caused by the release of Vanguard's third and fourth albums. Music Research contended that the release of the Vanguard albums surfeited the market for Hurt recordings and thereby prevented the profitable exploitation of its vault tapes of Hurt performances, resulting in a drastic diminution of the value of those tapes (111-12a, 249-51a). As Hoskins, the president of Music Research, put it (111a):

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* There was testimony that Music Research expended some effort in connection with the planned album. However, there was not even an attempt to prove the monetary value of the effort, which seems to have been de minimis, at best (108a). In the absence of proof of the pecuniary value of the wasted effort, the Court was, of course, correct in not submitting it to the jury as a damage item.

> "Well, with the issuance of those two records, the market for our record was essentially spoiled and saturated with these last two Vanguard releases..."

However, the release of Vanguard's third and fourth albums, and the consequent devaluation of plaintiffs' vault tapes, was not made possible, or facilitated or affected in any way, by plaintiffs' reliance on fraudulent statements.

Vanguard had obtained the right to release the albums by a contract (Exh. 57, 505-08a), which the Trial Court held valid and binding on Music Research (405-09a). That contract, if valid, authorized Vanguard's sale of those albums, as even plaintiffs admitted (253-55a, 407-09a). Thus, the release of the albums was no more than the exercise of Vanguard's contractual right and Music Research was legally powerless to interfere.* In other words, Music Research had to suffer the release of these albums by dint of its contractual obligations, and it is irrelevant that it complied with its contract in reliance on fraudulent representations.

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* The contract authorizing Vanguard to record and market Hurt's performances was made at the end of 1965 (459-60a), long before the false statements attributed to Vanguard are supposed to have occurred (96a, 99-100a, 101-02a). There was no contention that the Vanguard contract was invalid because of fraud in the inducement. In any event, the Trial Court held it valid and binding (405-08a).

No recovery may be had by one who is induced by fraudulent means to perform his legal duty and no more. In this case it was the contractual duty of Music Research to permit the release of the Vanguard albums, and it did no more.

Prosser, Torts (4th ed. 1971) §110, p. 731, states the rule as follows:

> "...there can be no recovery if the plaintiff is no worse off for the misrepresentation, however flagrant it may have been, as where for example he...is induced to do only what his legal duty would require him to do in any event."

In Story v. Conger, 36 N.Y. 673 (1867) defendant had bound himself by contract to convey to plaintiff good title to certain real property. The Court held that good title meant that there were no tax arrears and that in delivering a deed in which he convenanted that there were none, defendant had "but fulfilled that written contract." In so holding, the Court said (at p. 676):

> "Upon his own statement of the contract, the defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to, to induce him to perform that duty, there is no remedy. In its result the case stands where and as it ought to stand. Hutchins v. Hutchins, 7 Hill, 104; Story Eq. Jur., §203; Randall v. Hazelton, 12 Allen, 412, 415."

In Deobold v. Oppermann, 111 N.Y. 531 (1888), following the rule of Conger, the Court of Appeals held

(at pp. 541-42):

> "...It is of the very essence of an action of fraud or deceit, that the same should be accompanied by damage, and neither damnum absque injuria, or injuria absque damnum, by themselves constitute, a good cause of action. (Hutchins v. Hutchins, 7 Hill, 104; Michigan v. Phoenix Bk., 33 N.Y. 9.) Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform. (Thompson v. Menck, 2 Keyes, 82; Story v. Conger, 36 N.Y. 673; 93 Am. Dec. 546; Randall v. Hazeltine, 12 Allen, 412.)

This Court applied the same rule in China Fire Ins. Co. v. Davis, 50 F.2d 389, 391 (2d Cir. 1931), holding (per Learned Hand, J.):

> "...it is immaterial whether the plaintiff, the obligor, was fraudulently induced to pay that which was in any case due. Deobold v. Oppermann, 111 N.Y. 531, 19 N.E. 94, 2 L.R.A. 644, 7 Am. St. Rep. 760; Story v. Conger, 36 N.Y. 673, 93 Am. Dec. 546; Randall v. Hazelton, 12 Allen (Mass.) 413; Plews v. Burrage (D.C.) 19 F. (2d) 412."

Cf. Dress Shirt Sales Inc. v. Hotel Martinique Assoc., 12 N.Y.2d 339 (1963), denying recovery even where a new bargain varying the original contract was induced by fraud.

The evidence concerning the diminution in value of the Music Research vault tapes came into the case at a stage when other causes of action, which presupposed

the absence of a valid contract, had not yet been dismissed (405-08a, 412a). This evidence was immaterial to the fraud claim because the diminution of the vault tapes' value was the natural consequence of a valid contract and cannot be connected with reliance on any fraudulent statement.

POINT II

THERE WAS NO EVIDENCE TO SUPPORT THE DAMAGE AWARD

The Trial Court charged the jury that in determining damages it could consider (a) Music Research's expenses in planning a Hurt album that was abandoned when Vanguard released its third and fourth albums, and (b) the effect of the Vanguard albums on the fair market value of Music Research's vault tapes (469-70a).

There was no evidence to justify a verdict on either damage claim, much less a verdict for $275,000.

As shown above (Point I, p. 21), there was no proof that Music Research incurred any expenses in connection with the planned album. Hence, the jury could not award any damages on this score.

It is also demonstrated above (Point I, pp. 21-25) that Music Research could not recover fraud damages based on the devaluation of its vault tapes caused by Vanguard's release of Hurt albums under their contract.

Granting, however, for the sake of argument that such damages are recoverable, the verdict still cannot stand because of the insufficiency of the damage proof.

Moreover, the record affirmatively shows the damage award far exceeds what Music Research could conceivably

have lost -- even if deficiencies in the proof are overlooked.

The only witness who purported to give evidence concerning the value of the vault tapes was Eugene Rosenthal, the president of Adelphi.* At the outset of Rosenthal's damage testimony, plaintiffs' counsel announced that Rosenthal would testify concerning the "lost profits of Adelphi" (emphasis supplied) (257a). He testified that Adelphi could have made "net profits" of about $250,000 by producing five record albums from the vault tapes owned by Music Research (269-70a). Rosenthal dealt solely with "the profits which Adelphi expected to earn" (emphasis supplied) (259-61a, 269-72a, Exh. 91, 535-39a). He simply totalled Adelphi's projected future profits, about $250,000, and called them the "value" of the tapes before Vanguard's release of the third and fourth albums (268-70a, 264a).

It is not necessary to consider whether the sum total of future profits constitutes present value.

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* Other witnesses did not testify about value. They merely corroborated some facts and assumptions on which Rosenthal based his opinions; and, like Rosenthal, they considered only Adelphi's sales capacity (291a, 308a, 321-22a).

Adelphi's lost profits, or damages, are not at issue. Music Research, the only remaining plaintiff, had licensed the right to exploit the vault tapes to Adelphi in 1970 (Exh. 11, 489-90a, 107-08a), before their value was diminished by the release of Vanguard's third and fourth albums (108-10a). The saturation of the market caused by the Vanguard albums injured Music Research at most to the extent that Music Research failed to realize profits from the Adelphi license agreement.

Under that agreement, Music Research received an advance of $70(against guaranteed royalties of $2,500. In addition, Music Research was to receive royalties at the rate of $1.25 for each double album sold by Adelphi and presumably half that amount -- 62.5¢ -- for each single album sold (Exh. 11; 489-90a). Adelphi projected sales of 35,000 for each of two double albums and one single album (291a, Exh. 91, 535-39a). On those sales Music Research would have collected gross royalties amounting to $106,200.*

From this gross amount must be deducted one-half of "all publisher's fees," which Music Research

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* Royalties to Music Research at the rate of $1.25 for each of two double albums, each selling 35,000 copies (the sales projection), and at the rate of 62.5¢ for 35,000 copies of the single album, amount to $106,200.

was obligated to pay under the Adelphi license agreement (Exh. 11, ¶1, 489a). The record does not show the amount of this deduction. More important, from what was left, Music Research was obligated to pay one-half to Hurt or his estate under its contract with him (Exh. 1, ¶9 and ¶13; 486-88a).

In short, the most Music Research could hope to realize from its vault tapes was $53,100 before deduction of "publisher's fees" and other costs, e.g., overhead, which plaintiff failed to prove. The failure to prove off-setting costs, by itself, requires reversal. 342 Holding Corp. v. Carlyle Const. Corp., 31 A.D. 2d 605, 295 N.Y.S.2d 248 (1st Dept. 1968).

Thus, even if it were assumed that value equals future profits, then Music Research suffered at most a diminution of that value from $53,100 to "$5,000 to $10,000," the "archival" value of the vault tapes (264-65a, 267a). Even by disregarding the complete absence of proof of certain off-setting expenses, no rational jury could have found damages to Music Research beyond the $48,000 range.

It is obvious that the jury disregarded the Trial Court's injunction not to consider the damages of Adelphi (470a). The damages awarded by the jury were in

the range of (actually, they exceeded) those claimed for Adelphi. The jury's confusion was understandable because there was no evidence explicitly distinguishing the damages of Music Research from those of Adelphi.

Assuming that Music Research was entitled to fraud damages, and overlooking the deficiencies in the damage proof, the damage award was grossly excessive. The damage award of $275,000 is more than five times the arguable range.* Surely, the award is so high that it would be a denial of justice to permit it to stand. It far exceeds any amount as to which reasonable men might differ and must, therefore, be reversed for error of law. Dagnello v. Long Island Rail Road Company, 289 F.2d 797, 806 (2d Cir. 1961); New Orleans and N.E.R.R. Co. v. Hewett Oil Co., Inc., 341 F.2d 406 (5th Cir. 1965).

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* It is interesting to note, in contrast, that Vanguard lost between $11,000 and $20,000 in marketing the third and fourth Hurt albums (Exh. 63, 513a).

POINT III

IT WAS ERROR TO HOLD IMMATERIAL THE INVALIDITY OF THE HURT CONTRACT FROM WHICH MUSIC RESEARCH DERIVED ALL ITS RIGHTS

All of Music Research's rights to Hurt's recordings derived from the contract between Hurt and Music Research (Exh. 1, 486-88a).

That contract is unconscionable on its face. For example, it granted Music Research fifty percent of Hurt's gross compensation and obligated Hurt to pay all expenses out of his share. It conveyed to Music Research, without payment, ownership of all songs which Hurt had previously written and would subsequently write, and allowed Music Research to assign its vague obligations to anyone it chose. It bound Hurt for five years and, at the option of Music Research, for an additional five-year period if he grossed as little as $500 during the first five years.

Not only was the contract voidable, but it was formally repudiated by Hurt (Exh. 29, Exh. G-2; 499a, 569a) about six months after Hurt and Music Research contracted with Vanguard concerning Hurt's recording services (Exh. 57, 505a).

The Trial Court excluded additional evidence of the unconscionability of the Music Research-Hurt contract (144-46a), ruling that unconscionability was immaterial (139a). In ruling on this question, the Court's attention was centered on plaintiff's claim based on inducing breach of contract (136-42a).* However, that claim was later dismissed, and the Court overlooked that Hurt's repudiation of the Music Research contract, if that contract was unconscionable, would have divested Music Research of all rights to Hurt's recordings.

It was surely error requiring reversal to permit the jury to consider whether Music Research was entitled to damages for invasion of property rights without considering, or taking evidence on, the more fundamental question whether Music Research remained with any property rights, which Vanguard could have invaded.

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* The Trial Court ruled that, under New York law, to induce the repudiation of a voidable contract is just as tortious as it is to induce the breach of a valid contract (136-37a).

POINT IV

THE PROOF AFFIRMATIVELY SHOWS THAT MUSIC RESEARCH COULD NOT REASONABLY RELY ON THE CLAIMED FRAUDULENT STATEMENTS

Music Research, a corporation, claimed that it relied on false representations by Vanguard because it was ignorant of the fact that its apparent agent, Gart (406-07a), had entered into a contract with Vanguard (Exh. 57, 505-08a). It is difficult to comprehend the claim that a corporation could be ignorant of its own corporate act.*

A corporation is only a legal abstraction and can act and acquire knowledge only through its agents. Therefore, knowledge of a corporate agent is the knowledge of the corporation. 3 Fletcher, Corporations (Rev. 1965), Ch. 11, §787, pp. 18-19.

At one point the Court below did rule that "the knowledge of Gart would be imputed to Music Research under the record here . . . " (406a), and properly added that plaintiff's remedy for any breach of duty by its agent was to seek redress against him (408a). This

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* As is shown above (Point I, pp. 19-20), all false statements attributed to defendant related to the existence of that contract.

ruling correctly applied the law of New York. Farr v. Newman, 14 N.Y.2d 183, 189-90 (1964). Music Research knew, as a matter of law, the falsity of the claimed misrepresentation and reliance was therefore impossible. 1 Harper and James, The Law of Torts, (1956), p. 584.

Nevertheless, the Trial Court later permitted the jury to speculate whether Music Research knew of its own corporate act, consummated by Gart, its apparent agent (462-64a). The Court was evidently led into error by extensive testimony concerning the state of mind of Hoskins, who claimed to have been ignorant of Music Research's contract with Vanguard. Hoskins' state of mind, however, was irrelevant. As the Court below had ruled earlier (406a), Gart's knowledge was imputed as a matter of law to his principal, the corporate plaintiff, and the "knowledge" of the corporate principal was the only material issue.

But even assuming that Hoskins', rather than plaintiff's, state of mind is material, the record shows affirmatively that his claimed reliance on false statements attributed to defendant was unreasonable as a matter of law. Prosser, Torts (4th ed.) §108, pp. 715-16. Hoskins had to admit knowledge of facts which would have put any reasonable man on notice of the truth, i.e.

the existence of the Vanguard contract.

An advance to Hurt of $2,000 was called for by the Vanguard contract (Exh. 57, 505a) and Hoskins admitted knowing that Vanguard paid that advance (219-20a). In February, 1966, Hoskins attended at Vanguard's recording studio to observe Hurt record for Vanguard (95-6a, 183-84a), the central obligation imposed on Hurt by the contract (Exh. 57, 505-08a). Thus, by February, 1966, Hoskins knew that Hurt had been paid and was furnishing his services to Vanguard.

Several months later, in June, 1966, Hoskins received formal written notification, by registered mail, from defendant's lawyer that (Exh. G2; 569-70a):

> "...Mr. Hurt has entered into an exclusive recording agreement with Vanguard Recording Society, Inc. and that such company is the only party having the exclusive rights to release phonograph records...embodying the performances of Mr. Hurt".

In the face of this formal and unmistakeable notification of all the facts, and knowledge of the performance of the contract, no reasonable man could have relied on representations, a month later, that Hurt had not signed a contract with Vanguard (101-02a).

Shortly after Hoskins received the letter of defendant's attorney formally putting him on notice of the full truth, Vanguard released its first Hurt album for sale (103-04a). Surely, that should have alerted any reasonable man that the letter meant what it said, namely, that Vanguard openly claimed the right to market Hurt recordings. The same holds true for Vanguard's release of a second album, about a year later (105a).

The law will not permit a plaintiff to close his eyes to the truth, which is staring him in the face, and to claim that he relied on false representations. Prosser, supra, ibid.

In the light of the foregoing, neither Music Research nor Hoskins could have reasonably relied on representations that there was no contract.

POINT V

THE FRAUD CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS

The Trial Court charged the jury that a cause of action for fraud is barred by the Statute of Limitations unless the action is commenced within six years of the commission of the fraud, or within two years after the facts constituting the fraud were discovered, or could have been discovered by the exercise of reasonable diligence (468a)*

The last act which could be construed to be part of the commission of the fraud took place in July 1966. Admittedly, that is when the parties last spoke (180a). This action was brought on January 26, 1973 (475a), clearly more than six years after the commission of the fraud.

Nor can it be claimed, in the face of the admitted facts set forth in Point IV (supra, pp. 34-36), that plaintiff could not, by the exercise of reasonable diligence, have discovered the claimed fraud more than

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* The Court's charge embodied the accepted interpretation of the New York fraud Statute of Limitations. See, CPLR §203(f); 1 Weinstein-Korn-Miller, New York Civil Practice, §203.35; 7B McKinney, CPLR, Practice Commentaries, §203(f), p. 125.

two years -- or for that matter, more than six years -- before the action was commenced.

For example, the receipt of the formal letter by which Vanguard, through its attorney, revealed all the material facts makes it incontrovertible that "at least the possibility of fraud should have been apparent" to Music Research.

Case law has defined with great precision what is meant by "the exercise of reasonable diligence" to discover fraud. The period of limitations begins to run as soon as "at least the possibility of fraud should have been apparent [to plaintiff]." Klein v. Shields & Co., 470 F.2d 1344, 1347 (2d Cir. 1972). It is sufficient that plaintiff "could have known 'at least the possibility of fraud'". Mittendorf v. J.R. Williston & Beane Incorporated, 372 F.Supp. 821, 831 (S.D.N.Y. 1974).

The fraud claim is clearly barred by the Statute of Limitations, and no rational jury could have found otherwise.

POINT VI

THE JUDGMENT BELOW SHOULD HAVE BEEN VACATED ON DEFENDANT'S RULE 60 MOTION

Vanguard moved after the trial pursuant to Rule 60(b) (2) and (3), F.R. Civ. P., to set aside the judgment on the grounds that defendant had discovered new evidence which would have affected the outcome of the trial, and that the judgment was obtained by plaintiffs' fraud, misrepresentations, and other misconduct (574a).

Plaintiffs' damage claims were based entirely on purported proof that defendant's release of the third and fourth Hurt albums made it impossible for them to bring out a new Hurt album (e.g., 20-1a, 120a, 251a, 264-72a, 276a).

However, only weeks after the trial Vanguard discovered that plaintiffs had, in fact, released a new Hurt album in July, 1975, three months before the trial (576-79a, 582-83a, 590-94a). This evidence, with all due diligence, could not have been discovered sooner (576-81a, 640-45a).*

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* Plaintiffs' claim that Vanguard could have discovered the evidence sooner (603a), at most called for an evidentiary hearing, which Vanguard requested (633-34a). The claim is preposterous, in any event, in light of plaintiffs' efforts to conceal. See, infra.

Moreover, plaintiffs resorted to flagrant perjury to conceal their release of the new Hurt album. Music Research's president, Hoskins, testified at the trial (199a).

> "Q Mr. Hoskins, was it your present intention in the summer of 1975, to put out a Mississippi John Hurt record album?
>
> A The summer of '75?
>
> Q Yes, sir.
>
> A No."

Immediately following this false statement, he compounded the deception by testifying to vague plans for the possible future release of a new Hurt album (199-200a).

When confronted by the Rule 60 motion, plaintiffs had to admit that they had "put out" a new Hurt album in July, 1975 (608-10a). Unless plaintiffs mean to claim that the marketing of their new Hurt album in the summer of 1975 was "unintentional", the quoted testimony is false; and the context makes it plain that it was deliberately false.

Nor was Hoskins the only one to testify falsely on this point. Adelphi's president, Rosenthal, testified at the trial that the vault tapes had "now only archival value" (274a). On the Rule 60 motion, he admitted that,

at the very moment he was testifying about "archival value", his company was actively promoting and selling the new Hurt album (609-10a).

The extent to which Hurt recordings continued to be marketable after the release of the Vanguard albums was a central issue at the trial and plaintiffs' false testimony was obviously material to that issue.

When the Trial Court asked Adelphi's president directly, "Did you ever make a master* of John Hurt?", he only recalled that he had made a Hurt master more than ten years earlier (287a). He conveniently forgot (287a) that a little over three months before the trial Adelphi had made a "master" for plaintiffs' new Hurt album (635a, 611a).

Vanguard also offered evidence that plaintiffs continued their efforts to suppress evidence even after the trial (579a, 590-600a).

The motion for a new trial should have been granted pursuant to Rule 60, on the basis of the undisputed facts. It certainly should not have been denied without an evidentiary hearing, which Vanguard requested (633-34a).

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* A master is a record from which other records are made (285-87a).

The Trial Court's findings in denying the motion are squarly contradicted by the record, and the summary denial (678a) itself was a clear cut abuse of discretion.

POINT VII

PLAINTIFFS' REMAINING CAUSES OF ACTION WERE PROPERLY DISMISSED

Plaintiffs substantially concede that the dismissal of their remaining causes of action was proper if, as the Trial Court ruled (405-09a), Gart was vested with apparent authority to bind Music Research to the Vanguard-Hurt recording agreement (Exh. 57, 505-08a).

At the trial, plaintiffs admitted, with minor exceptions dismissed as trivial by the Trial Court, that all of Vanguard's actions in marketing Hurt records were authorized by that contract -- including Vanguard's release of the third and fourth Hurt albums (253-55a, 407-08a). On the cross appeal, plaintiffs contend only that the scope of Gart's apparent authority was an issue of fact for the jury, and seek reversal on that ground (P.Br. 14-18). They argue that if a jury were to find that Gart lacked apparent authority to bind Music Research, plaintiffs made out a prima facie case of unfair competition (P.Br. Point II), tortious interference with contract (P.Br. Point III) and unjust enrichment (P.Br. Point IV).

Plaintiffs' argument concerning each dismissed cause of action is expressly based on the assumption that Gart lacked apparent authority to bind Music Research and that, therefore, Vanguard's release of Hurt recordings under the contract was "illicit" (P.Br. 17-18, 21, 24).

Plaintiffs make much of the fact that at the first meeting between Solomon, Gart and Hoskins, Hoskins said that he wanted an agreement for "two and only two records" (P.Br. 7, 15-16). However, there was no evidence that Hoskins indicated to Solomon that this was the limit of Gart's authority. To quote Hoskins' own words (90a):

> "...it was explained to Mr. Solomon that we wanted a deal for two and only two records... but that Herb Gart would be handling the negotiations between the two parties."

Of course, in negotiations people do not always obtain all that they hope for. This is precisely what occurred in the earlier Mercury negotiations, where Hoskins also asked for a two-record contract, but finally agreed to four records (supra, pp. 9-10).

Plaintiffs mistakenly cite the testimony quoted above for the proposition that it was explained to Mr. Solomon that "Music Research... would only execute a contract limiting Vanguard to the production of 'two and

only two records' of John Hurt's music" (P.Br. 7). There is no testimony or other evidence to this effect, either at the page cited or elsewhere. Thus, the most important prop of plaintiffs' argument is based on a misapprehension of the record.

The record contains ample evidence to sustain the Trial Court's ruling that Gart had apparent authority to bind Music Research to the Vanguard agreement (supra, pp. 9-11).

For example, after his first conversation with Solomon, Hoskins turned contract negotiations over to Gart and never again discussed terms with Vanguard.

Vanguard sent a draft contract to Gart, who reviewed the draft with Hoskins. Gart made notes of changes to propose, and conveyed them to Vanguard. Gart and Hurt signed the final agreement, which shows extensive handwritten changes.

Hurt's signature on prior contracts with Vanguard had been treated by Vanguard and Music Research as sufficient to bind the latter. Thus, Vanguard had made two prior agreements with Music Research, which respectively authorized Vanguard to release albums containing Hurt's performances at the 1963 and 1964 Newport Jazz Festivals. Neither was signed by Music Research. One was

signed by John Hurt himself (Trial Exhibit 103) and the other, by one Spottswood "for John Hurt" (Exh. 13, 492a).

POINT VIII

EVEN ASSUMING THAT PLAINTIFFS' OTHER CAUSES OF ACTION WERE IMPROPERLY DISMISSED, THE FRAUD JUDGMENT MUST BE VACATED

Assuming, as plaintiffs urge, that the Trial Court erred in taking the validity of the Music Research - Vanguard contract from the jury, they are undoubtedly entitled to a new trial at which both parties may adduce evidence on the merits of the dismissed claims. By the same token, however, that portion of the judgment below from which plaintiffs do not appeal must also be reversed, because it is not even argueable that plaintiffs were the victims of fraud without assuming that there was a valid contract between Music Research and Vanguard.

The nub of defendant's fraud, as defined by the Court (460a), consisted of representations that Vanguard would publish only two Hurt records and "that Music Research would retain all its existing rights other than for the publication of these two albums." If there was no valid agreement, there was nothing materially false about the representations, for Music Research did "retain all its existing rights other than for the publication of [the] two albums".

In that case Music Research's fraud claim must fail because Vanguard through Solomon, perhaps unwittingly, made only representations which were literally true. With its existing rights, Music Research retained all the remedies which the law provides for infringement of property rights, and the claims seeking redress for such infringement should have been submitted to the jury, as plaintiffs contend in the cross-appeal.

Of course, had these claims not been dismissed Vanguard would have met them on the merits and would not have rested on its legal position that there was no fraud.

Conclusion

If this Court finds that Music Research failed to prove a prima facie case of fraud, or that the fraud claim was barred by the Statute of Limitations, the judgment below should be reversed with directions to enter judgment n.o.v. dismissing the fraud claim. On all other grounds set forth above, the judgment below should be reversed and a new trial granted.

The cross-appeal should be dismissed.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers
UNITED STATES COURTOF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

MUSIC RESEARCH INC. and ADELPHI RECORDS INC.,
Plaintiffs- Appellees- Appellants,

- against -

VANGUARD RECORDING SOCIETY, INC.,
Defendant and Third Party Plaintiff- Appellamt-Appellee
-against-
HERB GART d/b/a HERB GART MANAGEMENT INC.,
Third Party Defendant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 15th *day of* July *19*76 *at* 375 Park Avenue, New York, New York

deponent served the annexed Respondent Brief *upon*

Baker and McKenzie
Attorneys
the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 15th
day of July *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer
Reuben Shearer